Before The
Federal Communications Commission
Washington, D.C. 20554

In The Matter Of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229

COMMENTS OF WIREFREE PARTNERS III, LLC

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Summary

The FCC should dramatically revise its rules for the D Block spectrum to attract viable, commercial entities to the re-auction of this spectrum. Wirefree recommends that the Commission adopt rules for the re-auction of the D Block spectrum that incorporate the following principles:

- Allow designated entities to receive bidding credits without restraint on wholesale or leasing arrangements, without the severe unjust enrichment penalties adopted for the AWS auction and applied in the 700 MHz auction, and without unnecessary attribution of the revenues and assets of minority board members;

- Promote bidding by a consortium of bidders and alliances between DEs and non-DEs for a nationwide license or auction the D Block in smaller, geographic license blocks;

- Allow the D Block licensee to set the technical standards for its network provided it meets the overall standard of nationwide interoperability, make the build-out requirements more reasonable and extend the license term; and

- Significantly reduce the reserve price to let the market driven process of the auction determine the value of the spectrum and if the re-auction fails to produce a winning bidder, re-auction the spectrum without the Public/Private Partnership.

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COMMENTS OF WIREFREE PARTNERS III, LLC

The FCC should dramatically revise its rules for the D Block spectrum to attract viable, commercial entities to the re-auction of this spectrum. Wirefree Partners III, LLC ("Wirefree") and its principals have participated in multiple spectrum auctions over the past decade. In deciding whether to participate in each auction Wirefree carefully considers the regulatory constraints, approval processes, and ongoing regulation of corporate management, investment and investors. For Wirefree, the regulatory environment is often a primary driver on whether it will participate in a spectrum auction. Significantly, Wirefree chose not to participate in or even attempt to raise capital in the financial markets for the AWS auction or the 700 MHz auction. Wirefree's decision was based in large part on the overly restrictive nature of the rules for designated entities ("DEs") and the overwhelming complexity of the rules for the D Block. The single bid on the D

Block license and the decision by Frontline Wireless, the staunchest advocate of the D Block rules, not to bid demonstrate that Wirefree was not alone in its analysis or perception of the difficulties the rules would pose in raising capital.

Wirefree recommends that the Commission adopt rules for the re-auction of the D Block spectrum that incorporate the following principles:

- Allow designated entities to receive bidding credits without restraint on wholesale or leasing arrangements, without the severe unjust enrichment penalties adopted for the AWS auction and applied in the 700 MHz auction, and without unnecessary attribution of the revenues and assets of minority board members;

- Promote bidding by a consortium of bidders and alliances between DEs and non-DEs for a nationwide license or auction the D Block in smaller, geographic license blocks;

- Allow the D Block licensee to set the technical standards for its network provided it meets the overall standard of nationwide interoperability, make the build-out requirements more reasonable and extend the license term; and

- Significantly reduce the reserve price to let the market driven process of the auction determine the value of the spectrum and if the re-auction fails to produce a winning bidder, re-auction the spectrum without the Public/Private Partnership.

I. The Depth and Breadth of FCC Regulations Have a Direct Effect on A New Entrants Ability to Raise Capital

The wireless industry is one of the most vibrant segments of the telecommunications industry and one of the most competitive. These dual characteristics make it challenging for a company, especially a new entrant, to raise capital to bid for spectrum in an auction and to build and operate a

wireless network. The challenge is even more daunting when the network is subject to significant government regulation with aggressive build-out deadlines, technical requirements, licensed on a nationwide basis and in the uncharted territory of forging a partnership with a public safety licensee. The failure of the 700 MHz auction to attract a winning bidder for the D Block license leaves the question open of whether a new entrant or an existing carrier can develop a successful business model that incorporates the Public/Private Partnership.

Based on Wirefree's own experience and that of its team of entrepreneurs, Wirefree encourages the FCC to simplify its approach to the D Block Public/Private Partnership and to try to impose less rather than more government regulation. Complex and extensive government regulation increases the perceived risk of investment whether by venture capitalists, bankers or the public markets. The financial markets currently are extremely skeptical and have a low tolerance for risk posing a significant hurdle for any potential bidder to raise capital to bid on the D Block spectrum.

In the last decade Wirefree and its principals repeatedly have raised hundreds of millions of dollars in the financial markets for multiple, start up wireless carriers. Wirefree has raised funds from leading venture capital firms, in initial public offerings of stock and through the issuance of bond debt backed by lease payments. In each case, prior to the millions of dollars

in funding, Wirefree's investors conducted strict scrutiny of the FCC regulations, the competitive landscape and questioned how a new entrant could compete against established carriers with significant brand recognition, large marketing budgets and billion dollar networks. Since the FCC's changes to the DE rules in 2006, Wirefree has elected not to participate in any of the spectrum auctions based on the regulatory environment for DEs which posed too much risk to success. Accordingly, if the FCC wants to encourage new entrants to bid in the re-auction, it must remove many of the regulations initially applied to the D Block that had the unintended consequence of discouraging auction participation and investment in new entrants.

II. The DE Rules Are a Critical Part to Encouraging New Entrant Participation in Spectrum Auctions

New entrants that qualify as designated entities are one potential source of bidders for the D Block re-auction. The FCC's bidding credits offered based on a DE's size are of real and quantifiable value. However, the capital requirements for the D Block are significant and require flexibility to raise capital and operate a business with limited government intervention and ongoing approval and oversight. DEs will only be able to raise the capital necessary to participate in the auction and build networks on the D Block spectrum if the DE rules are revised to provide the flexibility to: (1) raise capital from multiple sources without having to attribute the revenues and assets of its investors or minority, non-controlling board members; (2) use spectrum in flexible and innovative ways without the restraints of "impermissible material relationships"; and (3) provide a viable path for the company to grow over the license period with management and investor changes that don't trigger unjust enrichment penalties.

a. Simplify the DE Rules to Require a Minimum Equity Interest and *De Jure* and *De Facto* Control by Small Business Entrepreneurs

Throughout the history of spectrum auctions, the FCC has adopted different rules for determining DE small business qualification and affiliation. In the first C block auction for PCS, the FCC clearly defined the boundaries for equity ownership, requiring the small business/entrepreneur

to own at least 25% of the equity as well as exercise *de facto* and *de jure* control over the licensee. In 2000, the FCC moved away from the minimum equity requirement to the controlling interest standard and eliminated any minimum requirement for equity ownership by the DE. In 2006, the FCC significantly revised the DE rules to restrain leasing and wholesaling of spectrum and to lengthen the holding period required before any change of control does not trigger an unjust enrichment penalty. The 2006 changes have dampened DE participation in spectrum auctions since the AWS auction. This trend can be reversed but it will require going beyond the limited exception to the material relationship rule suggested by the Commission in the Notice[1] and require revising the DE rules truly to promote investment by various sources in DEs. The FCC should apply DE rules that promote vibrant participation by returning to a 25% equity test combined with *de jure* and *de facto* control, eliminating the impermissible material relationship standard, and resetting the unjust enrichment penalties to apply only during the first five years of license term.

b. The Commission Should Clarify that Minority Board Members Are Not Controlling Interests In A DE

The Commission will foster participation the D Block re-auction by providing that its "controlling interest" rule does not require a DE to

[1] In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Band, Second Further Notice of Proposed Rulemaking, WT Docket No. 06-150 (rel. May 14, 2008) ("*Notice")* at ¶167.

attribute the revenues and assets of every single member of its board of directors or the board member's affiliates. Prior to Auction 58, the Commission modified its rules to eliminate the "control group" structure for the more flexible "controlling interest" standard in order to promote small business participation in auctions. When it adopted the more flexible "controlling interest" standard, the Commission said that the purpose was to "identify those controlling interests that actually have control through the application of the principles of either *de jure* or *de facto* control.[2] However, the Commission also adopted a rule that states that **all** officers and directors are deemed "controlling interests of the applicant."[3] The Commission's designation of **every** officer and director as a controlling interest is in direct conflict with the intended flexibility of the controlling interest standard. It is well established precedent, both for DEs and in corporate law, that a single director and a minority of directors on a board do not exercise *de jure* control over a corporate entity. Indeed, the definition of *de jure* control used consistently by the Commission imposes a majority control and 51% voting rule.[4]

In addition, since the related businesses of every single member of an applicant's board of managers are attributable, this rule has a chilling effect

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[2] In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82 (rel. Aug. 14 200) ("*Fifth Report and Order")* at ¶66.

[3] 47 C.F.R. §1.2110(c)(2)(F).

[4] 47 C.F.R. §1.2110(c)(2).

on investment in DEs. DE bidders and licensees are forced to screen their managers and directors for their attributable revenues and assets rather than their qualifications, investment or industry expertise. For example, the rule as applied prohibits a general partner in a venture capital firm who may be responsible for the investment decision in a DE from serving on a DE's board – even if that manager is one of nine members of a board of managers. Similarly, the rule prevents an investor with multiple outside investments and board positions in companies that exceed the revenue and asset caps for DEs from serving on the board in a minority capacity. These restrictions are unworkable for a D Block licensee that must raise billions of dollars and build a nationwide network. The Commission should clarify that only the affiliation of officers and of board members representing or appointed by the qualifying controlling interest should be counted in determining a DE's size.

III. The Commission Should Support Consortium Bidding for the D Block or License Smaller Geographic Areas

The capital required to buy a nationwide license and build a nationwide network are staggering for a new entrant and may be insurmountable. A new nationwide carrier faces a budget in the billions of dollars just to acquire spectrum and billions more to build a nationwide network without a guarantee of any subscribers. As the Commission calculated in the Notice, based on Frontline Wireless' estimates, the implied cost per square mile of a D Block network build could approximate $6,700.[5]

[5] *Notice* at footnote 113.

Increasing the build-out coverage just 0.3% added $1Billion to Frontline's estimated network costs. By contrast, venture capital firms typically invest $5-10 million in early stage deals. Increasingly, venture capitalists are investing in carrier infrastructure providers or companies offering consumer application for wireless devices rather than companies proposing to become a carrier. In 2004, Wirefree secured a $30 million investment from its two venture capitalists to participate in Auction 58. This was a large investment for the venture capitalists and nowhere near the amount of money needed to bid for the D Block license.

The scale of the financial and operational challenges of a building a nationwide licensed network likely will require that the winning bidder be either an incumbent carrier who can leverage existing infrastructure and investment or a consortium of new entrants or regional carriers who can build and operate on a more manageable scale. Accordingly, Wirefree encourages the Commission to actively promote the development of a consortium of bidders and to recognize the DE status of any entity in the consortium on an individual basis even if not all of the members meet the DE qualifications. A bidding consortium could parallel the success of the affiliate model used by AT&T Wireless and Sprint PCS in the late 1990s. Faced with consumer demand for an aggressive build-out on its PCS spectrum, Sprint PCS and AT&T chose to contract with smaller companies, many of them start-ups, to finance, build and operate wireless networks in

segments of their licensed territories. The services were often branded with the Sprint PCS or AT&T brand or sometimes co-branded in the case of AT&T. With the strength a nationwide network and brand behind them, these new entrants were able to access the capital markets, build their own networks, create new jobs and deliver service to unserved areas. As founders of AirGate PCS, a Sprint PCS affiliate in the 1990s, the Wirefree principals helped architect the first initial public offering of an affiliate of a wireless carrier. AirGate PCS's successful IPO proved the model in the financial markets and paved the way for subsequent IPOs by multiple new entrants affiliated with the larger carriers. A consortium of bidders in the D Block could replicate the success of the wireless carriers' affiliates. A consortium would allow bidders to find strength in numbers, share resources for common infrastructure such as billing and customer care while building their own interoperable regional networks and delivering service as part of a consortium with a nationwide network.

As an alternative to the use of bidding consortium, Wirefree encourages the Commission to eliminate the nationwide license for the D Block in favor of smaller geographic licensed territories using REAGs or CMAs. For new entrants and smaller companies, smaller markets pose a smaller financial and operational hurdle but still provide the opportunity to blend urban and rural markets. While more challenging than a single licensee, the Public/Private Partnership is still feasible with multiple

licensees. Each licensee could be required to work with the Public Safety Licensee and to build an interoperable system to allow seamless handoff and transparency. In addition, if some licenses remain unsold, the Commission could decide to void the auction and re-auction the licenses without the Public/Private Partnership as a condition.

IV. The D Block Licensee Should be the Final Arbiter of Technical Standards Subject to a Nationwide Interoperability Standard and The Build-Out Requirements and License Term Should be Adjusted

The D Block licensee is in the best position to design the architecture for the network to be use for commercial and public safety use. The FCC should not mandate technical specifications other than require that the network meet industry norms. Wireless technology is evolving at a rapid pace. The technology decisions made by carriers are multifaceted and not easily subject to government dictates. As evident by the current evolutions of 4G, Wimax and VOIP networks, network architectures are evolutionary not static. Costs also play a major factor in network infrastructure decisions. The FCC should not wade into this area of complexity but require that the network meet industry norms for reliability and robustness. Any government sanction of specific standards is wrought with the possibility of varied interpretations and challenges to whether a network meets the standards set by the government. This is an issue best left to the licensee whose operational goal is to have a reliable network delivering quality service to its customers. The Commission can, however, impose the overall requirement

that networks built on the D Block spectrum and subject to the Public/Private Partnership be interoperable. The wireless industry has made great strides in interoperability as evidenced currently by intercarrier roaming. The D Block licensee will be building a new network. With current technology, it is eminently feasible for D Block licensees to meet the standard of nationwide interoperability.

Wirefree supports adjustment of the build-out requirements to make them more reasonable and realistic similar to those of other 700 MHz licensees. The D Block licensee, more than any other licensee in the 700 MHz band, will have a complicated build-out and yet it has the most aggressive build-out schedule. The risk of default of the build-out is a risk considered by investors and all the more significant when the entity undertaking the build-out is a new entrant. Accordingly, Wirefree recommends that the D Block licensee be permitted to rely on other networks, such as the mobile satellite networks proposed by the FCC in the Notice, to meet its build-out and that the build-out period be modified to mirror the coverage requirements of other 700 MHz licensees. Wirefee also supports extending the license term from 10 to 15 years as a fair trade off for building a shared use network for public safety. While still unknown, this shared use requirement is expected to impose more costs on the licensee and will affect the ability of the licensee to recoup those costs and reach profitability.

V. The Reserve Price Should be Reduced Significantly and If No Winning Bidder Emerges Re-auction the Spectrum without The Public/Private Partnership

The FCC should impose a reserve price for the re-auction of D Block spectrum well below that used in the Auction 73. The revenue expectations for the 700MHz auction were exceeded with the successful auction of the other blocks and there is no reason to impose a high reserve price on the D Block. Unlike the other blocks, the market valuation of access to the 10MHz of public safety spectrum and the cost of meeting the obligations to the public safety community is unknown. These conditions obviously effect the market valuation and were significant enough to make the $1.3 Billion reserve price in the initial auction too high. The Commission should let the market-based auction process determine the spectrum's value and set a reserve price significantly below the $1.3 Billion reserve price used in Auction 73.

If the re-auction is held with the Public/Private Partnership and no winning bidder emerges, the Commission should re-auction the spectrum without the Public/Private Partnership condition. While laudable in its intent, the Public/Private Partnership may not be sustainable for a commercial entity. After two tests of this structure, the public interest would be better served by finding an alternative means to provide a nationwide, broadband, interoperable public safety network.

Respectfully submitted,

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